

1

2

UNITED STATES BANKRUPTCY COURT

3

SOUTHERN DISTRICT OF NEW YORK

4

-----x

5

In Re:

6

Chapter 11

7

LEHMAN BROTHERS

Case No. 08-13555 (JMP)

8

HOLDINGS, INC., et al, (Jointly Administered)

9

Debtors.

10

-----x

11

12

B E F O R E : HON. JAMES M. PECK,

13

U.S. BANKRUPTCY JUDGE

14

15

U.S. Bankruptcy Court

16

One Bowling Green

17

New York, New York

18

19

April 9, 2010

20

10:05 a.m.

21

22

Reported by:

23

MARY F. BOWMAN, RPR, CRR

24

JOB NO. 29397

25

1 BOIES - OPENING STATEMENT

2 talked about in that motion?" referring to
3 the 60(b) motion.

4 "A. Yes."

5 "Q. Is that the same discount that's
6 referred to on page 28 of the October 8,
7 2008 Alvarez & Marsal report, the 5 billion
8 reduction?

9 "A. I believe it applies to the same
10 pool of securities.

11 "Q. Is it different in any way?

12 "A. Well, no."

13 So the same so-called 5 billion
14 dollar, so-called secret discount was
15 something that the creditors committee,
16 financial advisor, Weil Gotshal, everybody
17 knew about it the first week in October.
18 Not just the first week in October. They
19 knew about it before then too and I am going
20 to come to those.

21 I want the Court to focus on this one
22 because this is where we have one of the
23 clearest statements that this 5 billion
24 dollar so-called discount, reduction,
25 however you want to characterize it, buffer,

BOIES - OPENING STATEMENT

1
2 however you want to characterize it,
3 different people have used different words,
4 was known about. And after this, did
5 anybody come and say we are going to oppose
6 the affirmance of this order on the appeal.
7 Quite the contrary, they fought for it on
8 appeal.

9 Did anybody come in and say we now
10 want to reexamine it we want to reopen it?
11 Nobody did that. And the reason because in
12 October, things were already still terrible.
13 The market was still down. This was still
14 desperately needed. Nothing had turned
15 around in October. And everybody was not
16 only accepting but seriously desiring the
17 continuation of the Barclays transaction.

18 Now, I am going to go through a series
19 of documents that are designed to do what
20 counsel for creditors committee said that we
21 needed to do in court which is to show you
22 what they saw at the time. They saw this.

23 What else did they see? Well, let's
24 go to chart 23. Now, this is the document
25 that I showed Mr. Miller and that Mr. Miller

1 BOIES - OPENING STATEMENT

2 next to chart 54.

3 Now, you heard the committee counsel
4 tell you that maybe they knew there was
5 something about a discount out there, but
6 they didn't have any idea what the magnitude
7 of it was or that it was a discount from
8 fair market value.

9 This is what the committee,
10 committee's counsel was told by Goldman
11 Sachs before the sale on September 19, "The
12 proposed sale goes way beyond this in that
13 it allows Barclays to cherry-pick owned
14 inventory, investment and other assets at a
15 windfall discount to fair market value, a
16 discount is at least several billion
17 dollars."

18 This is what the creditors committee
19 knew on September 19. Now, did that cause
20 them to come into Court and say when people
21 objected that this was a fire sale and too
22 great a discount? Yes, those objectors are
23 right, it is a windfall discount from fair
24 market value?

25 You didn't hear the creditors

BOIES - OPENING STATEMENT

committee or any of the movants saying anything like that to your Honor because they realized that this was a great deal for Lehman Brothers at the time. And this was the only deal for Lehman Brothers at the time. And so although they knew exactly what was going on, they didn't say anything. They didn't object, and not only did they not object, but they continued to support this transaction in this Court and on appeal.

Let me go next to chart 31. And this is Mr. O'Donnell's deposition, when he is asked, "When is the first point in time that Milbank or Houlihan communicated to Weil this concern about a 5 billion dollar miss match?

"On September 22 or at the end -- Sunday and Monday, the 21st and 22nd."

So this was not something that Weil Gotshal didn't know about, Milbank didn't know about, Houlihan didn't know about. The creditors committee knew about it. The trustee knew about it. Counsel knew about it. The independent financial advisors knew about

1 BOIES - OPENING STATEMENT

2 be hanged with that because they were scene of
3 the accident.

4 Now, the movants tried to do that by
5 saying to your Honor, well, Barclays was the
6 only person that knew this. We didn't know
7 it. Weil Gotshal didn't know it. Lazard
8 didn't know it. No one knew it except
9 Barclays and these supposedly rogue Lehman
10 employees.

11 Now, they knew all the facts about the
12 Lehman employees at the time that they were
13 telling the Federal District Court that
14 everybody operated in good faith and it was
15 arm's length.

16 So that argument, we think, is
17 actually foreclosed by a variety of grounds
18 including judicial estoppel and the mandate
19 rule. Even if they could make that argument,
20 it is inconsistent with what they knew,
21 because if I have done anything today, I hope
22 I have shown you that the kinds of facts that
23 the movants knew at the time in the period
24 from September to December were the exactly
25 the facts that they now come into this court

1 BOIES - OPENING STATEMENT

2 and say ought to be the basis for this relief
3 and what I am saying is that under those
4 circumstances, even if they had an ability to
5 try to tag Barclays for things that they and
6 other people were saying, they couldn't under
7 those circumstances. That is all I am trying
8 to say.

9 THE COURT: You don't deal with what I
10 think I heard this morning which is they
11 didn't know anything different at the time of
12 the appeal. It was really as a result of the
13 2004 discovery that was taken last year that
14 detailed information concerning what Barclays
15 knew, what the Lehman employees knew, when
16 they knew it, who they told, what they really
17 meant by "discount," all that stuff which
18 presumably will be embellished as we get into
19 the evidentiary hearing came into full view.

20 So while I hear your argument, you're
21 not dealing with their argument.

22 MR. BOIES: Your Honor, with respect,
23 I have got to disagree with the Court. I am
24 trying -- at least I am trying to deal with
25 their argument. Maybe I am not doing a good

BOIES - OPENING STATEMENT

1

2

3

4

5

6

7

8

9

10

11

12

13

fact that they knew on September 17, 18, 19,
and 20 about a gain that Barclays was going to
realize, I say in light of all of that, for
them to come in at this stage and say didn't
know anything about this, didn't have any
reason to act, couldn't have known what was
going on, totally didn't know anything more in
December than we knew in September, only found
out about this in 2004 is not credible. I
mean, it is not even possible, I think, to
credit those kinds of statements in view of
the documentary evidence here.

14

15

16

17

18

19

20

21

22

23

And I would just ask the Court to look
at the documentary evidence. Look not at
what people are saying now, not at what
people are trying to explain, but look at
the contemporaneous documents, look at what
was exchanged at the time, look at what was
said at the time, look at what these people
knew at the time, not what they now say in
which they say, well, yes, we knew about it
but we didn't really know about it.

24

25

They knew about it and the documents
show that and all I can do is -- and I will